84-1484 (2)

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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; WISCONSIN DEPARTMENT OF ADMINISTRATION; STATE BUREAU OF PROCUREMENT; SECRETARY, WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; DIRECTOR, STATE BUREAU OF PROCUREMENT, WISCONSIN DEPARTMENT OF ADMINISTRATION; JAN RICHARDSON; AND GARY C. SHEALY,

Appellants,

v.

GOULD INC., a Delaware Corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX ACCOMPANYING JURISDICTIONAL STATEMENT

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In The

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Nos. 84-1115 and 84-2075

Gould, Inc.,

Plaintiff-Appellee,

v.

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, et al.,

Defendants-Appellants,

Appeal from the United States District Court for the Western District of Wisconsin. No. 83 C 104 - **Barbara B. Crabb**, Chief Judge

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ARGUED SEPTEMBER 17, 1984 -
DECIDED DECEMBER 13, 1984

Before CUMMINGS, Chief Judge, WOOD, Circuit Judge, and FAIRCHILD, Senior Circuit Judge.

CUMMINGS, Chief Judge. GOULD, Inc., ("Gould") filed suit in the Western District of Wisconsin challenging the constitutionality of Wis. Stat. §§ 16.75(8), 101.245 (1981), which blacklist labor law violators. Both parties filed motions for summary judgment. The district court granted Gould's summary judgment motion, holding that the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the "NLRA"), preempted the state statutes. In a later hearing, the district court awarded Gould attorneys' fees under 42 U.S.C. § 1988. The individual defendants appeal both decisions of the district court. 1/ We

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1/ Gould filed suit against three Wisconsin state agencies and seven individual Wisconsin state officers and (Footnote continued)

affirm the lower court's grant of summary judgment but reverse as to attorneys' fees.

I

No genuine issues of material fact are in controversy. The parties dispute only the district court's legal conclusions set out in the opinion below, Gould, Inc. v. Wisconsin Department of Industry, Labor and Human Relations, 576 F. Supp. 1290 (W.D. Wis. 1983). Section 101.245 of the Wisconsin Statutes provides:

> (1) The [Department of Industry, Labor and Human Relations]

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employees. The district court dismissed the three defendant state agencies as immune from action under the Eleventh Amendment. That ruling is not at issue.

shall maintain a list of persons or firms that have been found by the national labor relations board, and by 3 different final decisions of a federal court within a 5-year period * * *, if the final decisions involved a cumulative finding of at least 3 separate violations, to have violated the national labor relations act, * * * and of persons or firms that have been found to be in contempt of court for failure to correct a violation of the national labor relations act on 3 or more occasions by a court within a 5-year period * * * if the 3 contempt findings involved a cumulative total of at least 3 different violations.

* * * * *

(4)A name shall remain on the list for 3 years.[2/] Wis. Stat. §101.245 (1981).

This list is known as the labor law violators' list. The real bite in the

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2/ This Section also provides:

> (5) if any person or firm files a written statement with the department alleging that the person's or firm's name should not be included on this list because the person or firm did not violate that national labor relations act as provided in sub. (1) or that 3 years have passed since the person's or firm's name was included on the list, the department shall hold a hearing on the matter. If the department finds that the allegations in the person's or firm's statement are correct, the department shall notify the department of administration that it should remove the person's or firm's name from the list.

legislation appears in Section 16.75(8), which provides:

> The department [of administration] shall not purchase any product known to be manufactured or sold by any person or firm included on the list of labor law violators compiled by the department of industry, labor and human relations under s. 101.245.

Wis. Stat. § 16.75(8) (1981).

Gould is a Delaware corporation with its principal place of business in Illinois. In August, 1982, two of its divisions had contracts to provide goods and services to Wisconsin in amounts in excess of $10,000 and expected to continue to bid on and be awarded contracts to provide goods and services

exceeding $10,000. Wisconsin's Department of Industry, Labor and Human Relations placed Gould on the labor law violators' list in August 1982, thus under Section 101.245(4) barring Wisconsin from doing business with Gould for three years, until July 1, 1985. Defendant John Driscoll, on behalf of the Wisconsin Department of Administration, advised Gould that its existing contracts would be cancelled as soon as that could be done without penalty. The predicate for these actions was the enforcement of three separate National Labor Relations Board ("NLRB") decisions against various Gould divisions during the preceding five years. Gould no longer owned any of these divisions at the time of being placed on the labor law violators' list, and none of the cited divisions were located in Wisconsin. Gould claims that

the two Wisconsin statutes violate the Supremacy Clause, Art. VI, of the Constitution, as well as the due process and equal protection clauses of the Fourteenth Amendment. The district court did not address the Fourteenth Amendment claims due to its disposition of the case on grounds of preemption. The court did, however, hold that Gould's Fourteenth Amendment claims were "sufficiently substantial to support federal jurisdiction and would justify an award of attorneys' fees, even though plaintiffs prevailed on another claim [preemption]," citing Mahar v. Gagne, 448 U.S. 122. (Order of May 25, 1984.) We have jurisdiction pursuant of 28 U.S.C. § 1291.

II

The difficulty in labor law preemption analysis is that "the aims and

social policy" Congress was implementing "were drawn with broad strokes while the details had to be filled in, to no small extent, by the judicial process." San Diego Building Trades Council v. Garmon, 359 U.S. 236, 240. Nonetheless, synthesis of the numerous decisions is possible. Garmon directs us to determine whether the activity the state would regulate is protected or prohibited by Sections 7 or 8 of the NLRA, or arguably so protected or prohibited. Id. at 244-245. When Section 7 or 8 clearly covers the conduct in question, then the NLRA preempts any state action, because to "leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." Id. at 244.

Exceptions to this general rule do exist. Courts must make "a balanced inquiry into such factors as the nature of federal and state interests in regulation and the potential for interference with federal regulation." Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25, 430 U.S. 290, 300. State interests that are "a merely peripheral concern" of federal labor law override the federal interest. Garmon, 359 U.S. at 243. Alternatively, state regulation may escape preemption by being directed at state "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." Id. at 244. Examples of this type of permissible state regulation

include permitting suits in state court for intentional infliction of emotional distress, Farmer, supra; for malicious libel, Linn v. United Plant Guard Workers, 383 U.S. 53; and for mass picketing and threats of violence, Automobile Workers v. Russell, 356 U.S. 634.[3/]

3/ Some activity is neither protected nor prohibited by the NLRA, nor even arguably so. In such cases the court must determine whether Congress intended to leave the activity at issue to the free play of economic forces, or whether states may regulate it. See Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132; Local 20, Teamsters, Chauffeurs and Helpers Unions v. Morton, 377 U.S. 252. Once again, a balancing process similar to that described above is required. See New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519, 527-528, 530-533 (plurality opinion).
(Footnote continued)

The defendants would circumvent this analysis by arguing that, because the

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The Ninth Circuit applied this balancing analysis in this situation in golden State Transit Corp v. City of Los Angeles, 686 F.2d 758 (9th Cir. 1982), certiorari denied, 459 U.S. 1105. The court of appeals vacated the district court's grant of a preliminary injunction prohibiting Los Angeles from allowing plaintiff's taxicab franchise to expire. One effect of the city's denial of the taxicab franchise renewal was to alter the balance of power in a collective bargaining dispute in favor of the union. Id. at 759. The question before the court was whether Congress had preempted the city's ability to allow the franchise to expire during labor negotiations as a regulation of conduct meant to be left to the free play of economic forces. Because the city's action involved the use of streets and (Footnote continued)

Wisconsin legislation seeks to promote compliance with the NLRA and does not

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highways, a traditionally local matter, and because Congress had exhibited no intent to interfere with the city's granting franchises to whom it pleased, the city's action was allowed. The effect on the national labor regulatory scheme was slight enough that state regulation was permissible. The instant situtation differs in its being directed expressly at violations of the NLRA, and its concomitantly greater impact on national labor law. Gould's attempted reliance on Golden State is therefore misplaced.

penalize conduct that the NLRA would protect, federal interest are not harmed. The defendants also contend that Wisconsin has a deeply rooted interest in compliance with the labor laws, so that its decision not to purchase goods and services from labor law violators should prevail over any possible impingement on the federal regulatory structure. We recognize that Wisconsin's decision to refuse all financial support and reward to those who repeatedly violate national laws reflects a laudable purpose of substantial importance to the people of Wisconsin. But we must balance Wisconsin's interest against the federal interests at stake and the statute's potential for interference with the federal regulatory scheme. Doing so demonstrates that the Wisconsin statutes are preempted.

The problem with the defendants' arguments is that it ignores that the NLRA is designed to be a remedial, not a punitive statute. Once an employer or union rectifies its unlawful conduct and makes those harmed whole, for example by reinstating a wrongfully-discharged employee with back pay, federal sanctions cease. Basing a boycott on federal labor law violations, regardless of where the violations occurred and whether they have been rectified, clearly interferes with the federal scheme. 4/

4/ The defendants argue that if the statutes are not preempted, then they are not punitive. Such reasoning inverts the true logic. If the statutes impose no penalty, then they most probably are not preempted, and not the other way around. Our objection to the statutes is that they do impose a penalty.

The problem can be stated in another way. The Wisconsin Legislation seeks to prohibit activity also prohibited by the NLRA. Garmon, supra, teaches that state regulation of both activity protected and prohibited by the NLRA is preempted. Defendants would limit Garmon and its progeny to those situations in which a state is attempting to prohibit activity protected by the NLRA. Nonetheless, the cases will not withstand such factual distinctions. The Court clearly stated in Garmon that its rule applied without distinction to a state's attempt to regulate either protected or prohibited activity. The majority emphasized that they necessarily were "concerned with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of

substantive law and differing remedial schemes." Garmon, 359 U.S. at 242. Indeed the NLRA was enacted to remedy the varying attitudes of the states toward labor law. Garner v. Teamsters Union, 346 U.S. 485, 490.[5/] The defendants

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5/ Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, highlights the importance of maintaining the balance Congress has set against possible infringement by the states. In that decision, the Supreme Court, although concluding that the union's activities (Footnote continued)

cannot argue that the Wisconsin statutes are saved from any such conflict between

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had been illegal, nevertheless held that those activities could not be subjected to a state's antitrust laws since the state laws could not be assumed to acord with federal labor policies. On the other hand, federal antitrust laws could be assumed to be carefully tailored in order to accomodate national labor policies, so that union activity could be subjected to them. Id. at 636-637. Thus Connell teaches that courts must examine with care state legislation directly affecting either side in a labor law dispute before upholding such statutes.

remedial schemes by their addressing the problem of recidivism instead of specific instances of labor law violations[6/] While recidivism is conduct that the NLRA has chosen not to prohibit directly, Congress' failure to do so does not

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6/ Admittedly, the Wisconsin scheme does not require a court to examine whether specific conduct was violatory of the NLRA. A court need only determine whether the company incurred the requisite number of labor law violations that were enforced by a federal court, regardless of whether the violations have been remedied. This configuration in fact makes the statute appear more, not less, like a penalty. In light of the entire Wisconsin statutory scheme, the statute's concerning itself with recidivism alone is not determinative.

necessarily imply that the remedy is thereby left to the states.[7/]

7/ In fact Congress has authorized the NLRB to deal with recidivism when the NLRB deems it appropriate. Accordingly, 29 C.F.R. § 101.13(b) (1983) provides that "[d]espite compliance, however, the Board's order is a continuing one; therefore, the closing of a case on compliance is necessarily conditioned upon the continued observance of that order; and in some cases, it is deemed desirable, notwithstanding compliance, to implement the order with an enforcing decree." Doing so alleviates the necessity of obtaining an enforcement decree later when violations occur and so allows the Board to act more quickly should an organization in initial compliance with an order subsequently violate it. Presumably the Board would initiate such action only against companies with bad track records on compliance, for the language of the regulation-allowing NLRB initiation of enforcement proceedings "in some cases"-implies that Congress intended the NLRB to penalize recidivism only in rare instances. Allowing the states indiscriminate punishment of recidivism impermissibly intrudes on the federal scheme of regulation.

The possibility of other states, adopting Wisconsin's general scheme supports our holding of preemption. The spectre of different states, imposing boycotts for various lengths of time, based on various numbers and types of NLRA violations, is sufficiently real to decline to uphold the Wisconsin legislation. Doing otherwise would reintroduce the "diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies," Garner, 346 U.S. at 490, that the NLRA sought to prohibit.

The defendants argue that Wisconsin is acting as a market-participant, not as a market-regulator, so that the foregoing analysis is inapposite. The argument is unpersuasive. The major cases on which they rely- Hughes v. Alexandria Scrap Corp., 426 U.S. 794; Reeves, Inc. v.

Stake, 447 U.S. 429; White v. Massachusetts Council of Construction Employers, 460 U.S. 204,-are not controlling. Each of these is a dormant Commerce Clause case, dealing with the range of state regulation activity permissible in areas where Congress has failed to act. They do not address the issue before us, the range of state regulation allowable when Congress has legislated decisively in the area.

The cases defendants cite that do consider NLRA preemption of state action are distinguishable too. Image Carrier Corp. v. Beame, 567 F.2d 1197 (2d Cir. 1977), certiorari denied, 440 U.S. 979, involved a New York City Resolution "requiring bidders for flat-form work to operate a union plant." Id. at 1199. Insofar as it based its identification of those companies from whom it would entertain bids on labor policies, the

Resolution parallels the statutes at issue in this case. But the analogue breaks down in that New York City was not imposing any penalty for failure to comply with the NLRA, nor was it requiring that an employee join a union despite Section 7's protection of a person's refusal to join. Id. at 1202. As such, New York was assessing no penalty for noncompliance with the NLRA. The issue for the Second Circuit then became whether the NLRA preempted the municipal Resolution because it was adverse to the NLRA rather than because it promoted the NLRA's objectives more vigorously than Congress would sanction. Because the court found no evidence to indicate that the Resolution had "even an indirect coercive effect on nonunion employees" and so in no way "alter[ed] the collective bargaining relationship within nonunion shops, there

[was] no need to determine whether Congress intended that federal labor law preempt those local practices which do alter collective bargaining relationships." Id.[8/] In other words,

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8/ In J.P. Stevens & Co. v. Jackson, 85 Lab. Cas. (CCH) 10,980 (N.D. Ga. 1978), the district court relied on Image Carrier. The case involved the mayor of Atlanta's decision to bar city contractors from purchasing goods or services from J.P. Stevens or any other (Footnote continued)

the Resolution did not regulate employees' conduct. Defendants suggest that the Wisconsin statutes have no coercive effect because they seek to influence conduct, not to regulate it. Nevertheless the breadth of the Wisconsin

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company with whom J.P. Stevens was a first-tier contractor "until and unless the J.P. Stevens Company and such of those companies with whom they do contract cease and desist from such discriminatory and illegal practices." Executive Order 77-10, quoted in id. at 19,781 (emphasis in original). Nonetheless, the court did not raise or discuss the labor preemption issue. Its failure to do so renders the opinion inapposite here. To the extent that the district court relied on Immage Carrier, (Footnote continued)

laws--a company's being prohibited from doing any business at all with the state for a period of three years--necessarily means that their imposition against a company imposes a much harsher sanction

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it did so for its due process analysis, not its preemption analysis.

The court also treated the mayor's decree as imposing only a condition precedent to J.P. Stevens' contracting with the city. Unlike the Wisconsin legislation, Mayor Jackson's Executive Order would cease to operate once J.P. Stevens came into compliance with federal labor law. It was not an unconditional three-year bar to doing business with Atlanta. This difference justified the district court's agreeing with the mayor that "he did not preclude plaintiff from contracting with the city, he merely inserted a reasonable condition precedent to such contracting." Id. at 19,782 (footnote omitted). See also id. at 19,784 (district court's acceptance of mayor's contention).

than Congress intended. The Wisconsin laws then are more than a policy statement; they actually regulate employers' conduct.[9/]

Amalgamated Transit Union, Div. 819 v. Byrne, 568 F.2d 1025 (3d Cir. 1977) (en banc), dealt with New Jersey's statement, during collective bargaining between privately owned transit companies

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9/ Indeed the Wisconsin legislature enacted the laws because it believed they would do so. The possibility of a three-year boycott by the state of Wisconsin imposes overmuch on the NLRA.

and labor unions, that the state would not continue to subsidize the operations of any company that agreed to an uncapped cost of living clause in its labor agreement. The Third Circuit stressed that "it is important to consider that New Jersey's interest is that of insuring that 'essential' transportation services are provided to the public, rather than regulating labor relations per se." Id. at 1030. This consideration is what distinguishes that case from the one before us. New Jersey's purpose in acting as it did was to conserve its scarce financial resources and ensure that it was purchasing the least expensive goods available on the market. The state was not, as is Wisconsin, attempting to regulate private companies' labor practices. Nor was it forbidding their operation in the state, though admittedly any company that

accepted an unlimited cost of living clause would have to forego receiving state subsidies. Wisconsin, on the other hand, does not suggest that its action is necessary to conserve public resources; the state merely wants to condition any contract award on the bidder's track record of compliance with the NLRA. Wisconsin's doing so significantly interferes with the mechanisms the NLRA has established for encouraging compliance so that they preempt the Wisconsin legislation.

Amalgamated Transit Union differs from this case in a second respect. New Jersey chose to subsidize private companies only because it believed that doing so benefited the public. The state could have decided at any time that doing so was no longer an efficient use of funds and repealed its legislation authorizing that allocation of money.

The situation before us is quite different. Absent a few narrow exceptions,[10/] contract bidders in Wisconsin have a right to expect that the company submitting the lowest bid will win the contract. Wis. Stat. § 16.75 (1981). This expectation differs from the hope of a private company that the state will continue to fund its activities. Wisconsin, unlike New Jersey, simply is not functioning as a private purchaser of services. The question is the rationale underlying

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10/ Among others, these include the consideration of life cycle costs such as energy efficiency, writing specifications to permit whenever possible the purchase of materials manufactured in the United States, and purchasing patented or proprietary articles. See Wis. Stats § 16.75 (1981). These exceptions reflect no intent to affect the national labor policy and so are not preempted.

Wisconsin's law. When the policy the law promotes is not efficient use of state funds but the intent to effect compliance with the NLRA, the regulation is preempted by the NLRA's establishment of a comprehensive regulatory scheme meant to preclude state action.[11/]

11/ That a statute may escape preemption because it is a general law not aiming to regulate conduct subject to Sections 7 or 8 of the NLRA or affect the bargaining relationships between employers and employees underscores the difficulties inherent in the defendants' arguments. See New York Tel. Co. v. New York Labor Dept., 440 U.S. at 529, 533 (plurality opinion) (pointing out that no attempt to affect the relationships governed by the NLRA was at stake). The constant reiteration in the caselaw of the reminder in Garmon that even laws of general application, as well as "laws directed towards the governance of industrial relations," 359 U.S. at 244, (Footnote Continued)

We rest our holding on the penalty that Wisconsin has imposed on recidivist labor law violators. The Wisconsin

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may be preempted supports a negative inference that laws directed specifically at labor relations, such as the Wisconsin legislation before us, should be regarded with great suspicion. See, e.g., New York Tel., 440 U.S. at 533 ("our cases have consistently recognized that a congressional intent to deprive the States of their power to enforce such general laws is more difficult to infer than an intent to preempt laws directed specifically at concerted activity").

legislation does not impermissibly burden Gould's federal appeals rights. What is impermissible is its punishment of recidivism, not its defining the companies affected in terms of number of court enforcements of NLRB orders. The possibility of incurring harsher sanctions because of an appeal is not an unheard of event in our system of law. For instance, the Supreme Court held in Chaffin v. Stynchcombe, 412 U.S. 17, that the possibility of a higher sentence on retrial did not chill the petitioner's appeal rights. In re Sewell, 690 F.2d 403 (4th Cir. 1982), and Nash v. Florida Industrial Commission, 389 U.S. 235, are not to the contrary. Nash involved Florida's denial of unemployment benefits to those who file unfair labor practice charges, and so involved direct state regulation of conduct protected by the NLRA rather than the problem of a state

penalizing conduct also penalized by the NLRA. Sewell in fact supports our decision. It involved a union's state law claim against a company president for tortious interference with a contractual relationship. The president had refused to recognize the union in order to challenge its certification by the NLRB. The NLRB found the president's conduct violative of the NLRA. Nonetheless, the state court refused to allow the state law claim, remarking that "[s]tate law which is invoked to redress conduct prohibited by § 8 of the Act falls squarely within Garmon's doctrine of preemption." Sewell, 690 F.2d at 408.[12/] The state law was preempted in

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12/ Accord Carter v. Sheet Metal Workers' Int'l Ass'n, 724 F.2d 1472 (11th Cir. 1984).

that case because it imposed a penalty on the employer that was in addition to the one imposed by the NLRA, not because it infringed on the employer's appeal rights. Sewell supports our result and reasoning.

That the initiative to appeal is not always in the hands of the private company buttresses the distinction made here. The NLRB may enforce some of its orders "notwithstanding compliance" by the company charged. 29 C.F.R. § 101.13(b).[13/] Consequently the NLRB itself may in some instances initiate an enforcement proceeding -- even if a private company would seek to avoid such a proceeding by complying with the order at issue.[14/] A private party's inability to control in every instance whether an enforcement order will be sought means that the Wisconsin statutes do not measurably affect a party's appeal

right. This is especially so since the number of appeals is not really being restricted at all. As long as a party's position has merit, then it most probably will prevail on appeal.[15/] The number of

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13/ See supra n. 7.

14/ The mechanism for doing so is detailed in 29 C.F.R § 101.14: "If the respondent does not comply with the Board's order, or the Board deems it desirable to implement the order with a court decree, the Board may petition the appropriate Federal court for enforcement."

15/ Gould argues that the Wisconsin legislation inhibits and employer's engaging in "gray area" activities out of the fear of incurring an NLRB violation, thereby circumventing the NLRB's determination of which such activities are permissible under the NLRA, and thus affecting the NLRB's ability to determine and develop national labor policy. To support its claim, Gould points to two instances in which it appealed NLRB orders to determine whether certain novel practices violated the NLRA, Gould Inc., 238 NLRB 618 (1978), enforced, 638 F.2d 159 (10th Cir. 1980); Gould Inc., 221 NLRB 899 (1975), enforced, 550 F.2d 1060 (7th Cir. 1977). This argument does not hold water. Even were Gould and other (Footnote continued)

violations is irrelevant to the Wisconsin statutory scheme; only the number of enforced orders is considered. But

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companies doing business with Wisconsin to be discouraged from engaging in certain activities, other companies would most probably do so, thereby affording to the NLRB the opportunity to determine their legality.

Any claim of "chilling" is speculative at best. The enforcement orders on which Gould's "disbarment" occurred were entered prior to the effective date of the state legislation, so that the Wisconsin laws could not possibly have had any effect on Gould's decision whether to appeal. Gould has pointed to no actual instances of chilling and yet contends that the Wisconsin laws would operate to restrict its appeal rights. We find that contention without basis and reject it for the reasons stated.

because the Wisconsin legislation does furnish a state remedy at variance with the federal statutory scheme, we hold that the Supremacy Clause preempts the statutes at bar.

III

Gould argues that the alleged restriction on its appeal rights imposed by the Wisconsin legislation justifies the district court's award of attorneys' fees based on Gould's preemption claim alone. This argument lacks merit, because we have already explained that no cognizable restriction occurred. Gould's attempted reliance on Main v. Thiboutot, 448 U.S. 1, Inada v. Sullivan, 523 F.2d 485 (7th Cir. 1975), is misplaced. Inada dealt with a threat by a police officer that, if true, barred the plaintiff from pursuing his lawful claim against the police officer. Consequently that case dealt with the direct impingement of the

individual's rights, a situation not applicable to Gould. Thiboutot, while expanding the reach of 42 U.S.C § 1983, held only that statutory claims raised under Section 1983 were proper claims for which attorneys' fees under 42 U.S.C § 1988 would be available. The case did not address the issue whether claims based on the Supremacy Clause would be cognizable under Section 1983. The Supreme Court has elsewhere recognized that not all statutes secure rights within the meaning of Section 1983, even though individuals may benefit from their provisions. Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 19; Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 28. Section 1983 was enacted to override discriminatory state laws, provide a remedy where state law was inadequate, and furnish a federal remedy

where the state remedy, although adequate in theory, was not available in practice. Monroe v. Pape, 365 U.S. 167. The Eight Circuit, when faced with the problem whether a Commerce Clause claim was cognizable under Section 1983, found the function of the Commerce Clause, relating not to individual rights but rather to the distribution of power between the state and federal governments, to be the dispositive factor. Consolidated Freightways Corporation of Delaware v. Kassel, 730 F.2d 1139, 1146 (1984). That court recognized that both the Supremacy and Commerce Clauses "limit the power of a state to interfere with areas of national concern." Id. at 1144. After an examination of the purposes of Section 1983 as defined in Monroe, the court stated that "[t]o hold that an alleged violation of the Commerce Clause

constitutes an action cognizable under § 1983 would fail to serve any of these purposes and would be an unwarranted extension of the Civil Rights Act." Id. at 1146. That reasoning applies to the issue before us and similarly bars our allowing attorneys' fees based solely on Gould's success on its preemption claim.[16/]

16/ The court in Consolidated Freightways relied in part on Chapman v. Houston Welfare Rights Org., 441 U.S. 600. Its doing so emphasizes the identity in function between the Supremacy Clause and the Commerce Clause. Chapman dealt with the question of whether a Supremacy Clause claim brought in district court under 42 U.S.C § 1343(3) was cognizable under Section 1983, and held that it was not. That result supports the one we reach, (Footnote continued)

But in addition to its preemption claim, Gould raised two Fourteenth Amendment claims, one based on due

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although it is not dispositive since it was based on the wording and legislative history of Section 1343(3). Gould brought its claim based on both 42 U.S.C. § 1331 and Section 1343(3) and therefore and had a different jurisdictional predicate. Nonetheless, the variance between the role of the Supremacy Clause and that of Section 1983 in the federal governmental scheme convinces us that Section 1983 does not encompass claims based strictly on preemption.

process and the other on equal protection, both of which are cognizable under Section 1983. Such claims might provide a basis for attorneys' fees under Section 1988. Should the preemption claim on which Gould has prevailed arise out of a common core of facts or be based on legal theories related to its Fourteenth Amendment claims, awarding attorneys' fees would be proper. Hensley v. Eckerhart, ____ U.S. ____, 76 L.Ed.2d 40. Gould has not, however, met this standard. Gould's due process and equal protection arguments centered on the restriction that the Wisconsin statutes

placed on Gould's federal rights. But we did not hold the statutes preempted by the NLRA for this reason. As seen, the NLRA preempts the Wisconsin legislation because it imposes a penalty for repeated violations of the NLRA, not because it burdens Gould's appeal right. Since Gould's appeal right is not impermissibly burdened, it has no basis on which to claim attorneys' fees. Consequently they are denied.

The district court's invalidation of the Wisconsin statutes is affirmed, but that part of the decision awarding Gould attorneys' fees is reversed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

GOULD, INC., a Delaware Corporation, with its principal place of business in Illinois,

Plaintiff,

v.

ORDER
83-C-104-C

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR and HUMAN RELATIONS, and WISCONSIN DEPARTMENT OF ADMINISTRATION, STATE BUREAU OF PROCUREMENT, and JAMES GOSLING, Secretary, Wisconsin Department of Industry, Labor and Human Relations, JOHN K. DRISCOLL, Director, State Bureau of Procurement, Wisconsin Department of Administration, JAN RICHARDSON, State Bureau of Procurement, Wisconsin Department of Administration and GARY C. SHEALY, Chief, Labor Standards Bureau, Wisconsin Department of Industry, Labor, and Human Relations, Equal Rights Division,

Defendants.

- -

In this civil action, plaintiff Gould, Inc., seeks injunctive and declaratory relief with respect to defendants'

continued enforcemnt of Wis. Stats. §§ 101.245 and 16.75(8)(1981), which bar an employer from doing business with the State of Wisconsin or its agencies if the employer has had three or more National Labor Relations Board findings which have been affirmed by a federal court of appeals. Plaintiff asserts that the statutes are unconstitutional in that they (1) violate the supremacy clause of Article VI of the United States Constitution; and (2) violate plaintiff's rights under the due process and equal protection clauses of the Fourteenth Amendment.

In an order dated February 18, 1983, I issued a preliminary injunction ordering defendants to honor Gould's existing contracts with the state, to entertain future procurement contract bids from Gould, and to affirmatively revoke all notices to state agencies and state

vendors that Gould is barred from doing business with the state.

Plaintiff and defendants have now moved for summary judgment, contending they are entitled to judgment as a matter of law. From the parties' stipulation of fact, I find there are no genuine issues as to the following facts.

FACTS

Plaintiff is a Delaware corporation with its principal place of business in the state of Illinois. Plaintiff has approximately twenty separate and autonomous divisons, each engaged in the development, manufacture, and sale of distinct and often unrelated products at separate locations throughout the United States and certain foreign ccuntries. Each division has a separate budget and profit and loss statement, as well as

separate personnel and facilities. Each division is responsible for the conduct of its own labor relations.

Defendants, Wisconsin Department of Industry, Labor and Human Relations, Wisconsin Department of Administration, and the State Bureau of Procurement, are all administrative agencies of the State of Wisconsin. The four individual defendants are heads of, or employees within, these agencies. James Gosling is the Secretary of the Department of Industry, Labor and Human Relations; John K. Driscoll is the Director of the Bureau of Procurement; Gary C. Shealy is the chief of the Labor Standards Bureau within the Department of Industry, Labor and Human Relations; and Jan Richardson is an employee within the Bureau of Procurement.

On May 21, 1980, Wis. Stats. §§101.245 and 16.75(8) (1981) became effective. These statutes are commonly referred to as the Labor Law Violators List statutes. They require the Department of Industry, Labor and Human Relations to maintain a list of employers who have had three or more adverse findings by the National Labor Relations Board affirmed by a federal court of appeals within the preceding five years. Once an employer is put on the list, it is barred from selling products in the State of Wisconsin for three years.[1/]

1/ Section 101.245 provides:

> (1) The [Department of Industry, Labor and Human Relations] shall maintain a list of persons or firms that have been found by the national labor relations board, and by 3 different final decisions of a federal court within a 5-year period as determined under sub. (1m), if the 3 final decisions

(Footnote continued)

Prior to the effective date of these statutes, various divisions of plaintiff were found guilty by the National Labor Relations Board of four separate violations of the National Labor Relations Act. Each Board determination was

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> involved a cumulative finding of at least 3 separate violations, to have violated the national labor relations act. ...
>
> (1m) On or before July 1 of each year the department shall compile the list required under sub. (1) based upon the 5-year period which ended on September 30 of the year preceding.
>
> * * *
>
> (4) A name shall remain on the list for 3 years.

Section 16.75(8) provides:

> The [Department of Administration] shall not purchase any product known to be manufactured or sold by any person or firm included on the list of labor law violators compiled by the [Department of Industry, Labor and Human Relations] under §101.245.

appealed before May 21, 1980, and three of the four determinations were affirmed by federal courts of appeal before May 21, 1980.[2/] All four cases involved the refusal of one of plaintiff's divisions to comply with a determination of the Board. In three of the four cases, the Board initiated the appeal after the relevant divison had refused to comply. In the fourth case, both parties cross-appealed to the court of appeals. As of August 25, 1982, none of the divisions involved in these National

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2/ Gould, Inc., 216 N.L.R.B. 1031 (1975), enforced in part, reversed in part, 1977 CCH Labor Relations Cas. ¶11,953 (per curiam) (6th Cir. 1976); Gould, Inc., 221 N.L.R.B. 899 (1975), enforced, 550 F.2d 1060 (6th Cir. 1977); Gould, Inc., 237 N.L.R.B. 66 (1978), enforced, 610 F.2d 316 (5th Cir. 1980); Gould, Inc., 238 N.L.R.B. 618 (1978), enforced, 638 F.2d 159 (10th Cir. Dec. 18, 1980).

Labor Relations Act proceedings was still owned by plaintiff.

By letter dated August 25, 1982, plaintiff was notified of its inclusion on the labor law violators list and its debarment until July 1, 1985. As of the date of the letter, plaintiff's Medical Products Division and its Instruments Division were doing business with the State of Wisconsin in amounts in excess of $10,000, and has outstanding bids submitted to the State of Wisconsin in excess of $10,000. These divisions, as well as all of plaintff's divisions, are proscribed under Wisconsin's Labor Law Violators List statutes from further bidding for state procurement contracts until July 1, 1985. Prior to this court's entry of a preliminary injunction against them, defendants notified all current and potential state vendors that

they could not sell products to the State of Wisconsin which contain Gould-produced components. Finally, absent the preliminary injunction, all outstanding Gould contracts with the State of Wisconsin would have been cancelled as soon as the state could have done so without penalty.

OPINION

Jurisdiction is present. 28 U.S.C. §1331 and 1343(3).

I. Eleventh Amendment Immunity

The three non-individual defendants, the Department of Industry, Labor and Human Relations, the Department of Administration, and the Bureau of Procurement, have moved for dismissal of this suit against them for lack of subject matter jurisdiction. The law is clear that under the Eleventh Amendment

to the United States Constitution, state governments and their administrative agencies are immune from federal suits for monetary damages, Edelman v. Jordan, 415 U.S. 651, 663 (1974), and for prospective injunctive relief, Alabama v. Pugh, 438 U.S. 781, 782 (1978). Therefore, this suit will be dismissed with respect to the three non-individual defendants.

However, plaintff's suit against the four employees and departmental heads represents a different issue. The Eleventh Amendment immunity doctrine does not preclude a federal court from enjoining state officials sued in their individual capacity from enforcing any state law found to be repugnant to the United States Constitution. Ex parte Young, 209 U.S. 123 (1908); see Edelman v. Jordan, 415 U.S. at 664. Such

prospective equitable relief may be granted by a federal court even though such an injunction might have ancillary effects on the state treasury. Quern v. Jordan, 440 U.S. 332, 337 (1979).

Plaintiff's suit to enjoin the individual defendants' continued enforcement of Wis. Stats. §§101.245 and 16.75(8) (1981) does state a valid cause of action over which this court may exercise jurisdiction.[3/]

3/ In its complaint, plaintff requested a damages award in an amount to exceed $10,000. In its motion and briefs for summary judgment, plaintiff makes no explicit references to its request for monetary damages. I assume from that omission that plaintiff has abandoned that claim. See Taylor v. Fee, 233 F.2d 251, 259 (7th Cir. 1956).

II. Federal Preemption

A. Current Labor Preemption Doctrine

The proper analytical approach to the doctrine of federal labor law preemption is not easy to discern from the case law. See, e.g., Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees v. Lockridge, 403 U.S. 274, 285 (1971); Cox, Recent Developments in Federal Labor Law Preemption, 41 Ohio St. L.J. 277, 300 (1980). The United States Supreme Court discussed the doctrine in New York Telephone Co. v. New York State Department of Labor, 440 U.S. 519 (1979), but the plurality of opinions in that case left many unanswered questions. Nonetheless, I believe a logical approach can be derived from the New York Telephone opinion and from the line of cases preceding it.

The United States Supreme Court has identified two tests for federal labor preemption. The first is the "arguably protected/arguably prohibited" test set out in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). Under this test, the initial inquiry is whether the activity purported to be regulated by the state action is either protected under §7 of the National Labor Relations Act, 29 U.S.C. §157 or prohibited under §8 of that Act, 29 U.S.C. §158, or arguably so protected or prohibited. Garmon, 359 U.S. at 245. The second inquiry under Garmon is whether the regulated activity is "merely [a] peripheral concern of the Labor Management Relations Act...[or] touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional

direction," it cannot be inferred that Congress has deprived the states of the power to act. Farmer v. Carpenters, 430 U.S. 290, 296-97 (1977) (quoting Garmon, 359 U.S. at 243-44).

In Farmer, the Supreme Court emphasized that the Garmon analysis is not to be applied mechanically. Rather, application of the second inquiry is to be by a case-by-case balancing test under which a court must determine whether an exception to the general presumption of federal preemption is warranted. A state's legitimate nonlabor interests in regulating the activity in question must be balanced against the federal government's interests in uniform labor regulation and the likely degree to which the state regulation will interfere with those federal interests. Farmer, 430 U.S. at 297-301. If the activity subject

to state regulation is merely a peripheral concern of the National Labor Relations Act, minimal weight is to be given to the federal interest factor. If the state regulated activity touches state nonlabor interests deeply rooted in local feeling and responsibility, the state interests factor is given a relatively large weight in the balancing equation. Finally, if the state law "is so structured and administered that, in virtually all instances, it is safe to presume that [state] judicial supervision will not disserve the interests promoted by the federal labor statutes," Farmer, 430 U.S. at 290 (citing Motor Coach Employees v. Lockridge, 403 U.S. 274, 297-98 (1971)), then the degree of state interference with federal interests is given a small value in the balancing analysis.

It is important to note that Garmon's "absent compelling congressional direction" language is not to be invoked merely by mechanically classifying the state regulated private activity as a peripheral concern of federal labor law, as touching deeply rooted local interests, or as virtually never disserving federal interests. Rather, it is only if the net balancing of these factors weighs against federal preemption that the general presumption favoring federal preemption will not be invoked "in the absence of compelling congressional direction" to preempt.

The second avenue to federal labor preemption was developed in Local 20,

Teamsters Union v. Morton, 377 U.S. 252 (1964) and Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976). Under the Morton/Machinists test, a court looks to whether Congress intended the neither protected nor prohibited private conduct to be governed only by the free play of economic forces. Machinists, 427 U.S. at 144; New York Telphone, 440 U.S. at 530-31. If the answer is "yes," then

Farmer's balancing test analysis must be performed.4/

4/ The second part of the Morton/-Machinists test is the focal point of much of the confusion over federal labor law preemption. In Machinists v. Wisconsin Employment Relations Com'n, 427 U.S. at 147-48, the Court stated that the "crucial inquiry" is whether "the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes," (quoting Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 380 (1969)). The authors of the various opinions in New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519 (1979) tended to focus their disagreemnt upon what presumption of congressional intent follows from this "crucial inquiry," with a "majority" of concurring and dissenting justices agreeing that any state regulation which significantly affects the balance of economic bargaining forces between labor and management is presumptively preempted in the absence of express congressional direction to the contrary. Id. at 547-49 (Blackmun, Marshall, JJ., concurring); id. at 560 (Powell, Stewart, JJ., and Burger, C.J., dissenting); see The Supreme Court, 1978 Term, 93 Harv. L. Rev. 60, 270 (1979). Unfortunately, this

(Footnote continued)

Both commentators and courts have recognized that the essence of federal labor preemption analysis is the Farmer balancing test. That is, in the absence

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controversy in New York Telephone obscured the fact that while Machinists identified as a "crucial inquiry" the question whether exercise of state authority would frustrate implementation of the Act, Machinists did not hold that it was the sole inquiry. Indeed, in Machinists, the Court recognized that under this second test for federal labor law preemption, the other two factors of the overall Garmon balancing test are also relevant. Machinists, 427 U.S. at 136. See Teamsters v. Morton, 377 U.S. 252, 257 (1964). Moreover, in New York Telephone, Justice Steven's plurality opinion found that the general applicability and protection of deeply rooted local intersts of the New York unemployment compensation law counterbalanced the law's frustrating effect upon federal labor law interests. New York Telephone, 440 U.S. at 540. In his concurring opinion, Justice Blackmun agreed that the Garmon "deeply rooted local intersts" factor might be relevant under the Morton/Machinists test for preemption, but thought it irrelevant under the particular facts of the case. Id. at 550-51.

of an express statement by Congress, all private conduct will be either arguably protected, arguably prohibited, or left to the free play of economic forces, and thus fall into either the Garmon or Morton/Machinists line of analysis. Since both these doctrines dictate that the Farmer balancing test should be applied to the facts of each case, that test is the correct focal point for federal labor preemption analysis. See Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1351-68 (1972) and Recent Development, 64 Cornell L. Rev. 595, 609-12 (1979) (cited in Palm Beach Co. v. Journeymen's and Prod. Allied Servs., 519 F. Supp. 705, 711-12 n. 10 (S.D.N.Y. 1981)); see also Wilkes-Barre v. Newspaer Guild, 504 F. Supp. 54, 66 (M.D. Pa. 1980) ("The cases that have excepted tort claims from the preemption

doctrine are consistent with the 'frustration' test, 'reflect[ing] a balanced inquiry into such factors as the nature of the state and federal interst in regulation and the potential for interference with federal regulation.'") (quoting Garmon, 359 U.S. at 244) (emphasis added).

If, on balance, the three Farmer factors (state interest, federal interest in uniform labor regulation, and frustration of that federal interest) weigh in favor of state regulation, there is no federal preemption.[5] If, however, the balance of the three Farmer factors

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[5] Of course, this assumes that there is no express congressional direction of preemption.

weighs in favor of preemption, the state law must be declared preempted.[6/]

B. Merits

Defendants assert that the state's proprietary interest in its purchases of goods and services is a traditionally

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6/ Again, this assumes no express congressional statement of deference to state power in the specific area or activity under scrutiny.

local matter deeply rooted in local feeling and responsibility.7/

7/ Defendants have relied heavily upon the "market participant" doctrine enunciated in Hughes v. Alexandria Scrap Corp., 416 U.S. 794 (1976), Reeves, Inc. v. Stake, 447 U.S. 429 (1980) and succeeding cases. Defendants argue that the state is not regulating private conduct between labor and management but is merely influencing it pursuant to Wisconsin's legitimate proprietary powers. Under the Hughes/Reeves doctrine, state action is not subject to the traditional balancing analysis under the dormant commerce clause, see e.g., Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970), if the state is acting as a "market participant" rather than a "market

(Footnote continued)

In deciding whether similar assertions met the first element of the Farmer balancing test, other courts have

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regulator." White v. Massachusetts Council of Constr. Employers, ___ U.S. ___, 103 S. Ct. 1042, 1045-46 (1983). In essence, defendants argue that a similar "market participant" categorical exception also should be applied to exempt state proprietary action from scrutiny under the federal labor law preemption analysis. This is incorrect.

> In Hughes v. Alexandria Scrap, the Court noted expressly that this exception from dormant commerce clause scrutiny arose only "in the absence of congressional action. ..." Alexandria Scrap, 426 U.S. at 810. Nothing in the commerce clause prohibits congressional restrictions of state actions which have the pur

(Footnote continued)

asked whether the state law is one of "broad general application" or one

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pose or effect of interfering with the free flow of interstate commerce or which interfere with the uniformity and supremacy of federal labor law. Only the Tenth Amendment raises such a possible limitation on federal preemption power and defendants do not assert that the statutes in this case are protected from federal National Labor Relations Act regulation under the Tenth Amendment's state immunity doctrine as set forth in National League of Cities v. Usery, 426 U.S. 833 (1976). Indeed, such an argument would appear dubious given the Supreme Court's analysis of the third prong of the National League of Cities test in E.E.O.C. v. Wyoming, ____ U.S. , 103 S. Ct. 1054, 1060-64 (1983).

> Therefore, the federal labor law preemption balancing test must be performed to ascertain whether Congress intended implicitly to preempt state laws such as Wis. Stats. §§101.245 and 16.75(8). Whether these statutes promote local proprietary interests is relevant only insofar as that is probative in determining whether such interests are "deeply rooted in local feeling and responsibility," i.e., whether they promote legitimate, nonlabor state interests.

"specifically directed towards the governance of industrial relations." See, e.g., Garmon, 359 U.S. at 244. Although both Garmon and Farmer, 430 U.S. at 300, emphasized that the general applicability of a state law is not sufficent to exempt it from preemption, in both cases, as well as in the plurality and concurring opinions in New York Telephone, the Court recognized that this factor may be probative of whether the state law has as a predominant purpose the enhancement of legitimate, nonlabor, deeply rooted local interests. New York Telephone, 440 U.S. at 532-33 (plurality) and at 550-51 (concurrence). In general, the Supreme Court has found a deeply rooted local interest only in cases involving state regulation of "personal torts and violence to property, and [its] holdings have been closely circum-

scribed." Wilkes-Barre v. Newspaper Guild, 504 F. Supp. at 66 (citing cases).

In New York Telephone, a plurality of the Court concluded that New York's unemployment compensation statute should be treated as one reflecting deeply rooted local interests because the predominant purpose of that statutory scheme was "not to regulate the bargaining relationship between the two classes [labor and management] but instead to provide an efficient means of insuring employment security in the State." New York Telephone, 440 U.S. at 533. The plurality also relied heavily on the substantial evidence that in fashioning the participatory federal unemployment compensation scheme, Congress had been sensitive to the states' interests in determining the substantive provisions and eligibility criteria of their

unemployment compensation programs. Id. at 539.

The holdings in these cases tend to undercut the force of the defendant's assertion. First, the essence of the Labor Law Violators List law is not one of general applicability. Rather, it is directed specifically towards effecting the labor relations of those employers who are adjudicated federal labor law violators. Defendants have not suggested that §§101.245 and 16.75(8) have any legitimate nonlabor purpose, such as providing remedies for personal torts and violence to property or fashioning an unemployment compensation program. Rather, defendants assert merely that a "deeply rooted historical power of a state is its proprietary capacity to choose from whom it will purchase goods and services." (Defendants' Brief in

Support of Defendants' Motion for Summary Judgment at 9). Such a claim for categorical exemption from federal labor preemption scrutiny is unpersuasive. See supra note 7.

It may be that the exercise of this proprietary function is deeply rooted in tradition. However, in this instance, the exercise of that function has the wholly illegitimate purpose of discouraging federal labor law violations by employers. Defendants concede that this is the purpose of §§101.245 and 16.75(8):

> The state has a deeply rooted policy of discouraging labor law violations, and the State, as a market participator in the purchase of goods and products, can so restrict its purchasers so as not to promote labor law violators as an exception to NLRA preemption ... Wisconsin is not engaging in direct state regulation of private labor conduct, but is merely seeking to influence private conduct already prescribed [sic] by federal labor policy.

Defendants' Brief, cited supra at 12, 18 (emphasis in original). I conclude that the weight to be accorded the state interest reflected in §§101.245 and 16.75(8) is minimal at best.

Under Farmer, the second element is the magnitude of the federal interest in relation to the state regulation. That is, if the private activity subject to state regulation is merely a peripheral concern of the National Labor Relations Act, federal labor interests are only minimally affected by the state action and, therefore, are accorded slight weight in the balancing analysis.

The traditional federal interests in federal labor law preemption have been generally labeled as those of "primary jurisdiction" and "federal supremacy." See e.g., Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 199-200

(1978). In essence, these interests are the basis of the Garmon "arguably protected/arguably prohibited" and the Morton/Machinists "free play of private economic forces" tests.8/

These federal interests, aimed at ensuring a uniform national approach to governmental regulation of labor relations, will always outweigh a state interst that is not a deeply rooted, legitimate nonlabor interest if the state regulation significantly affects or

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8/ That is, if the activity is either arguably protected or prohibited by the National Labor Relations Act, this federal regulation of the activity has primary jurisdiction over any state regulation. If indeed Congress intended to leave the activity to the free play of private economic forces, federal supremacy over any state regulation of the conduct is appropriate under the supremacy clause. In both situations there is a need for a uniform national approach to governmental regulation of labor relations.

infringes upon the federal interests. Because I have found that the state's interest in this case is not a deeply rooted one, the only remaining issue to be determined is the degree to which §§101.245 and 16.75(8) affect federal labor interests adversely.9/

Employers who want to appeal from Board decisions will be deterred by Wisconsin's categorical refusal to

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9/ This, I believe, is what the Court meant by its statement in New York Telephone that the "crucial inquiry" is whether "the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes." That is, the greater the degree to which the state law frustrates or infringes upon federal labor law uniformity and supremacy interests, the less likely it is that the state law has as its predominant purpose or effect legitimate, nonlabor, deeply rooted local interests. In essence, the Court used the frustration prong as a stand-in for the other two elements of the Farmer balancing test. See supra n. 4.

purchase goods from employers who have three National Labor Relations Board convictions that have been affirmed in whole or in part by a federal court of appeals. Furthermore, employers who might refuse to comply with a Board decision in order to cause the Board to appeal will be deterred from doing so. This state law infringes upon the role of the federal judiciary prescribed under the National Labor Relations Act, cf. In re Sewell, 690 F.2d 403, 409 (4th Cir. 1982):

> To permit a union to [sue an employer in state court] for refusing to bargain [with a union whose certification the employer contests] in violation of S8(a)(5) - a refusal made necessary by the Act in order that the employer can contest certification in a [federal] court of appeals - would, in the words of Farmer, present a "realistic threat of interference with the federal regulatory scheme." 430 U.S. at 305. ...

(Emphasis added.)

Furthermore, a declaration by this court that Wisconsin's statutes are not preempted would open the door for other state debarment statutes, each listing a different number or mix of federal labor violations and convictions as a prerequisite. This would make it difficult for employers to predict the consequences of their actions, cf. Garner v. Teamsters Union, 346 U.S. 485, 490 (1953) (Exclusive jurisdiction is vested in the Board "to obtain uniform application of [the Act's] substantive rules and to avoid [the] diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.") In essence, it is a primary function of the Board to determine which "gray area" private acts fall within the protected, prohibited, or "free play"

categories. Wisconsin's law deters employers from engaging in any such "gray area" activities out of fear that the activity might later be declared a federal labor law violation, and state business might thereby be lost.

Thus, Wisconsin's statutes are likely to affect significantly both the initial Board determination that an activity is protected, prohibited, or left to market forces under the Act, and review of Board decisions by the federal courts of appeals. Moreover, §§101.245 and 16.75(8) explicitly provide for substantial cumulative penalties (for three or more affirmed labor law violations) beyond the remedies prescribed by the Board and the Act in general. Cf. San Diego Building Trades Council v. Garmon, 359 U.S. at 247 ("Since remedies form an ingredient of any integrated

scheme of regulation, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict.").

In summary, I conclude that both the purpose and effect of §§101.245 and 16.75(8) are to significantly infringe upon and inhibit activities and interests that are central to the federal labor policy enunciated in the National Labor Relations Act. Legitimate, nonlabor local interests are not primarily or even significantly furthered by the statutes. Therefore, in the absence of compelling congressional direction to the contrary,[10] the Farmer balancing analysis

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10/ Indeed, as plaintiff points out, any discernible congressional intent is apparently in favor of federal preemption of the Wisconsin statutes since a similar debarment proposal for federal government procurements

(Footnote continued)

compels the conclusion that these statutes are preempted by federal labor

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guished from New York Tel. v. New York Labor Dep't, 440 U.S. 519, 536-44 (1979), id. at 546-47 (Brennan, J., concurring) and id. at 547 (Blackmun, Marshall, JJ., concurring), where in reaching the conclusion that Congress did not intend the National Labor Relations Act to preempt unemployment schemes a majority of justices relied upon the substantial evidence of congressional intent to grant broad discretion to the states in fashioning their unemployment compensation programs.

> Again, in their arguments about the relevancy of the congressional refusal to authorize federal debarment of labor law violaters, defendants confuse federal labor preemption doctrine with the Tenth Amendment's state immunity doctrine. See Defendants' Brief in Opposition to Plaintiff's Motion for Summary Judgment at 4-6; see supra n. 7.

(Footnote continued)

law and, thus, unconstitutional under the supremacy clause of the United States Constitution.[11]

ORDER

IT IS HEREBY ORDERD that

1) Wis. Stats. §§101.245 and 16.75(8) (1981) are preempted by the federal labor laws and thus unconstitutional under the Supremacy Clause of Article VI of the United States Constitution;

2) defendants are permanently enjoined from (a) debarring plaintiff from doing business with the State of Wisconsin pursuant to §§101.245 and 16.75(8); (b) refusing to purchase from

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[11] Because I find that Wis. Stats. §§101.245 and 16.75(8)(1981) are preempted by federal labor law, I do not reach plaintff's due process and equal protection claims.

any state vendor products which contain components produced by plaintiff's divisions; and (c) including plaintff on the "Labor Law Violators List."

Entered this 20th day of December, 1983.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

Opinion by Judge Cummings
JUDGMENT - ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

December 13, 1984

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. HARLINGTON WOOD, Jr., Circuit Judge

Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge

GOULD, INC.,

Plaintiff-Appellee,

v. Nos. 84-1115
and 84-2075

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR and HUMAN RELATIONS, et al.,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF WISCONSIN

No. 83-C-104
Barbara B. Crabb, Judge

This cause was heard on the record from the United States District Court for the Western District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED in part, REVERSED in part, in accordance with the opinion of this Court filed this date. Each party is to bear its own costs on appeal.

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WISCONSIN

GOULD, INC., Civil Action File No. 83-C-104-C

Plaintiff,

v. JUDGMENT

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, ET AL.,

Defendants.

This action came on for consideration before the Court, Honorable Barbara B. Crabb, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered.

It is Ordered and Adjudged that:

(1) Wis. Stats. Sections 101.245 and 16.75(8) (1981) are preempted by the federal labor laws and thus unconstitutional under the Supremacy

Clause of Article VI of the United States Constitution;

(2) Defendants are permanently enjoined from (a) debarring plaintiff from doing business with the State of Wisconsin pursuant to Sections 101.245 and 16.75(8); (b) refusing to purchase from any state vendor products which contain components produced by plaintiff's divisions; and (c) including plaintiff on the "Labor Law Violators List."

APPROVED this 20th day of January, 1984

/s/ Barbara B.Crabb
BARBARA B. CRABB, District Judge

Dated at Madison, Wisconsin, this 23 day of January, 1984.

/s/ Joseph W. Skupniewitz
Clerk of Court
JOSEPH W. SKUPNIEWITZ

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GOULD, INC.,

Plaintiff-Appellee,

v.

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, et al.,

Defendants-Appellants.

NOTICE OF APPEAL TO THE
UNITED STATES SUPREME COURT

Notice is hereby given that the defendants-appellants herein appeal to the Supreme Court of the United States from the final decision and judgment of this court, entered on December 13, 1984, insofar as said judgment affirmed the judgment, order, decree or decision of the district court. This appeal is taken

pursuant to 28 U.S.C. secs. 1254(2) and 2101(c).

Dated this 18th day of February, 1985.

BRONSON C. LA FOLLETTE
Attorney General

/s/ Charles D. Hoornstra
CHARLES D. HOORNSTRA
Assistant Attorney General

Attorneys for Defendants-Appellants

Department of Justice
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IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 84-1115 and 84-2075

GOULD, INC.,

Plaintiff-Appellee,

v.

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR & HUMAN RELATIONS, et al.,

Defendants-Appellants.

CERTIFICATE OF SERVICE

CHARLES D. HOORNSTRA, being a member of the bar of this and the United States Supreme Court, certifies that he served the plaintiff-appellee with a copy of the notice of appeal to the United States Supreme Court on behalf of the defendants-appellants by causing same to be deposited in the United States mails, postage pre-paid, on the 18th day of

February, 1985, addressed to its counsel of record, to wit: Columbus R. Gangemi, Jr., and Gerald C. Peterson, Winston & Strawn, One First National Plaza, Chicago, Illinois, 60603, pursuant to Rules 10.2 and 28.3 of the United States Supreme Court. All parties required to be served have been served.

Dated this 18th day of February, 1985.

/s/ Charles D. Hoornstra
Charles D. Hoornstra

Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9945